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In the Supreme Court of the United States

OCTOBER TERM, 1971

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

UNITED STATES OF AMERICA

JACKSONVILLE TERMINAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 127a) [1] is reported at 451 F. 2d 418. The opinion of

[1] "Pet. App." references are to the separately bound joint appendix filed with the three petitions.

the district court (Pet. App. 1a) is reported at 316 F. Supp. 567.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1971. On September 7, 1971, the court of appeals extended the time for filing applications for rehearing in all three cases until October 1, 1971, and on September 28, 1971, the court granted a further extension to and including October 8, 1971. Petitions for re-hearing and suggestions for rehearing *en banc* were filed by the various petitioners on October 6, October 7, and October 8, 1971. The petitions for rehearing were denied on November 18, 1971. The petitions for certiorari were filed on February 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that prior to the effective date of Title VII of the Civil Rights Act of 1964 (July 2, 1965) the Jacksonville Terminal Company had hired and assigned blacks to lower paying jobs because of their race.

2. Whether the court of appeals correctly held that present seniority systems perpetuate the effects of the past discriminatory hiring and assignment practices of the Terminal Company by preventing qualified black employees from competing on an equal basis with their white contemporaries for the better paying jobs, and that such seniority systems are neither *bona fide* nor required by business necessity.

3. Whether the court of appeals abused its discretion in directing relief to overcome the present discriminatory effects of the seniority systems.

4. Whether individual employees of the Terminal are indispensable parties to this suit.

5. Whether maintenance of segregated locals by two unions, and the refusal of the local of a third union to recruit formerly excluded blacks for membership were properly held by the court of appeals to be in violation of Title VII.

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, are set forth in the Appendix, *infra*.

STATEMENT

This suit was filed by the Attorney General, pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6, against the Jacksonville Terminal Company and the 16 labor organizations which have collective bargaining agreements with the Terminal.[2]

[2] These unions are the Brotherhood of Railroad Trainmen (BRT) and Brotherhood of Locomotive Firemen and Enginemen (BLF&E), both now affiliated with the United Transportation Union (UTU); Railroad Yardmasters of America (RYA); Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC); Transportation-Communication Employees Union (TCU, now affiliated with BRAC); Brotherhood of Locomotive Engineers (BLE); Brotherhood of Maintenance of Way Employees (BMWE); American Railway Supervisors Association (ARSA); Brotherhood of Railroad Signalmen (BRS); International Association of Machinists and Aerospace Work-

The complaint alleged that the Terminal had engaged in hiring, promotion and transfer practices which discriminated against blacks; that the unions had entered into collective bargaining agreements with the Terminal which tended to perpetuate the effects of the discriminatory practices; and that three of the unions (BRAC, BMWE and BRCA) maintained segregated locals in violation of Title VII.[3] The complaint sought injunctive relief to bar future discrimination and correct the continuing effects of past discrimination.

The uncontradicted evidence at trial showed that all but eight of the Terminal's 257 black employees were assigned to lower paying, predominately black jobs and all but two of the 275 white employees were assigned to higher paying, predominately white jobs as of August 6, 1969, more than one year after the initiation of this suit (Pet. App. 133a–135a).[4] Each

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ers (IAMAW); International Brotherhood of Electrical Workers (IBEW); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Boilermakers); Sheetmetal Workers International Association (SMW); Brotherhood of Railway Carmen of America (BRCA); International Brotherhood of Firemen, Oilers and Helpers (IBFO); and System Federation No. 50 of the Railway Employees' Department, AFL-CIO (System Federation No. 50—joint bargaining agent for the IAMAW, IBEW, Boilermakers, BRAC, SMW, and IBFO). (Pet. App. 2a, n. 2; 128a, n. 2.)

[3] BRCA consolidated its two separate locals four months after the present suit was filed (Tr. 2036–2038).

[4] Of the eight blacks in otherwise all-white jobs in August 1969, four were promoted to such jobs after this suit was filed in June, 1968. Of the other four blacks, three were promoted to supervisory positions in the predominately black Baggage and Mail Department beginning in 1964, and the fourth held a

of the blacks employed by the Terminal in 1969 was initially hired into a predominately black job and none had been initially assigned or hired into a predominately white job. All but two of the predominately white jobs paid more than any of the traditionally black jobs (Pet. App. 134a–135a).[5] It was further uncontroverted that black employees could not use the seniority earned in their black jobs to bid on and hold jobs formerly reserved exclusively for whites (Pet. App. 138a-140a).

The district court, however, held that the government had failed to prove any part of its case by a preponderance of the evidence and ordered the action dismissed (Pet. App. 108a, 126a). That court ruled that it was the government's burden:

> (a) to prove that defendants had committed specific acts and practices of racial discrimination in employment since the effective date of the Act (July 2, 1965); (b) to prove the commission of such acts and practices independently with respect to each and every allegation contained in the complaint; (c) to prove that such specific acts and practices were intentional and such as to constitute a pattern or practice of racial discrimination as opposed to mere isolated acts; and (d) to establish all essential elements of its case by a preponder-

job (Switchman) which at an earlier time had been shared by blacks but which later was reserved only for whites (Pet. App. 134a–135a).

[5] The two exceptions were the jobs of Carpenter Helper and Electrician Helper, which are training jobs for the positions of Carpenters and Electricians (Pre-Trial Stip. Fact Nos. 7, 8; Pet. App. 135a).

ance of the evidence in order to establish a clear right to the injunctive relief sought [Pet. App. 108a].

While affirming the district court's finding that the Terminal had not discriminated in post-Act initial job assignment practices (with the exception of test and job criteria practices in the Baggage and Mail Department which the court of appeals found discriminatory (Pet. App. 186a, n. 26)), the court of appeals held (with one judge dissenting) that the district court had erred in failing to find (1) that the Terminal had engaged in discriminatory pre-Act hiring and assignment practices, and (2) that the effects of these practices were being perpetuated by the Terminal's present promotion and transfer policies, carried out pursuant to collective bargaining agreements with the petitioner unions (Pet. App. 189a, 199a). The court of appeals held that the district court's improper findings resulted from its having committed three principal errors of law in: (1) restricting its view of what constituted racially discriminatory conduct to specific acts occurring after the effective date of Title VII (July 2, 1965); (2) limiting evidence of discrimination to a period beginning only a few years before Title VII's effective date, and (3) not giving proper weight to the uncontroverted statistical evidence offered by the government (Pet. App. 164a–174a). After considering the other evidence of pre-Act discrimination in the rec-

ord,* along with the statistical evidence, the court of appeals concluded that pre-Act racial discrimination had been clearly established (Pet. App. 190a–191a).

The court of appeals further found that the seniority systems perpetuate the effect of the past discriminatory assignments because they prevent black employees, when a vacancy occurs, from exercising their seniority in other crafts or classes from which they had initially been excluded (Pet. App. 138a). The court of appeals held that the Terminal and Unions had failed to show that business necessity required the systems to be operated in this manner (Pet. App. 191a–199a). Accordingly, because of the continuing discriminatory impact of the seniority systems, and because of the lack of business necessity for their continuation, the court of appeals held that the seniority systems could no longer be used to restrict the seniority of qualified blacks to the lower paying jobs to which they were assigned (Pet. App. 191a–199a).

In April 1967, the Terminal began using a test devised by a supervisor as one of the factors for determining eligibility for the better paying, predominately white jobs in its Baggage and Mail Department. Blacks who took the test did not score as well as whites (Pet. App. 203a, 148a). The court of appeals ruled that use of the test was unlawful because the Terminal had failed to demonstrate that success on the

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*This evidence included a provision in the BRAC agreement until 1962 to bar promotions of blacks, and the use of the term "promotable" in several other agreements to exclude blacks from consideration for better paying jobs (Pet. App. 168a–171a, 189a–190a).

test was related to successful performance on the jobs for which it was given, and also because the Terminal had not required white incumbents in those jobs to take the test (Pet. App. 204a–206a).

Maintenance of segregated locals by BRAC and BMWE and the failure of UTU's Local 624–T to recruit blacks (coupled with its constitution's former exclusion of blacks from membership) were also found violative of Title VII by the court of appeals, as was the maintenance by the Terminal of segregated toilet, locker and shower facilities for several categories of its employees (Pet. App. 206a–209a, 156a–161a).

Finally, the court of appeals set forth guidelines for the relief to be afforded by the district court (Pet. App. 209a–214a). Petitions for rehearing and for rehearing *en banc* were denied (Pet. App. 218a–219a).

ARGUMENT

The major holding of the court of appeals here is that a seniority system which tends to lock blacks into the lower paying, traditionally black jobs to which they were assigned on the basis of their race, and thus perpetuates the effects of past discrimination, is unlawful under Title VII of the Civil Rights Act of 1964. That holding follows all of the earlier appellate decisions on this point,[7] and is in accord

[7] *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (C.A. 4); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (C.A. 4), reversed on another issue, 401 U.S. 424; *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7) (sex discrimination). Closely analgous decisions have held that

with the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, that Title VII prohibits not only overt discrimination, but also employment practices which are neutral on their face and even in their motive, but which have a disproportionate impact on blacks or other minorities. Contrary to the suggestion of petitioners, it is clear that in enacting Title VII, Congress intended to cover the railroad industry, and did not contemplate that that industry would operate under different rules of law than other industries; nor is there justification for treating craft and class seniority systems differently from other seniority systems (see pp. 11–13 *infra*). Accordingly, while the decision below does constitute a precedent for that industry to the extent that the factual basis of prior discrimination can be shown, review by this Court is not warranted.

1. The union petitioners challenge the holding of the court of appeals that the Terminal had engaged in discriminatory pre-Act assignment practices. The statistics in this case, which were uncontroverted, show that all black employees of the Terminal hired before the Act were initially assigned to lower paying jobs whereas white employees were either initially assigned to higher paying jobs or promoted to these jobs soon after hire (Pet. App. 190a, 172a–173a).

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union referral systems which perpetuate past discrimination violate Title VII: *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (C.A. 8); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *United States* v. *Electrical Workers, Local 38*, 428 F.2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (C.A. 9), certiorari denied, No. 71–380, December 7, 1971.

Moreover, the court of appeals did not base its holding on the statistical evidence alone; it examined the "total employment picture" at the Terminal (Pet. App. 174a, 176a), including the use of provisions of collective bargaining agreements designed to discriminate against blacks (*supra*, pp. 6–7). This examination disclosed that the relegation of almost all blacks to the lower paying jobs was not accidental, but resulted from purposeful discrimination. The court's determination that the Terminal had practiced pre-Act racial discrimination comports with other appellate decisions in which similar assignment policies have been reviewed. See *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (C.A. 5). Cf. *Robinson* v. *Lorillard Corp., supra; Griggs* v. *Duke Power Co., supra.*

The court of appeals correctly held that the district court had erred in confining its view of what constituted racially discriminatory conduct to specific acts occurring after the effective date of Title VII, and in restricting the relevant evidentiary time frame for a showing of racial discrimination to a period nearly contemporaneous with Title VII (Pet. App. 164a–174a). Present employees at the Terminal hold seniority dates as far back as 1925, and more than 55 percent of them were initially hired prior to 1950 (Gov't Ex. 9). It was necessary to consider employment practices at the time of their hiring and throughout their subsequent employment in order to determine whether present practices operate to exclude present black employees, because of their race, from assign-

ments to the higher paying, traditionally white jobs. *United States* v. *Dillon Supply Co.*, 429 F.2d 800 (C.A. 4). Cf. *Griggs* v. *Duke Power Co, supra,* 401 U.S. at 429–430.[8]

2. Having determined that the seniority systems in use at the Terminal perpetuate the effects of past discriminatory hiring and assignment practices, the court of appeals correctly held they were unlawful under Title VII (Pet. App. 199a). A *bona fide* seniority system within the meaning of Section 703(h) of the Act, 42 U.S.C. 2000–e2(h), must be more than facially neutral. An apparently neutral seniority system which tends to lock blacks into lower paying, traditionally black jobs to which they were assigned on the basis of their race, perpetuates the effects of past discrimination, and is unlawful under Title VII. *Local 189, United Papermakers* v. *United States, supra; United States* v. *Bethlehem Steel Corp., supra; Robinson* v. *Lorillard Corp., supra; Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.) [9]

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[8] Petitioner unions' contention that the court of appeals' decision has unfairly prevented them from presenting evidence on pre-Act practices (BRT Pet. 21–22) is without merit. All of the petitioners had ample opportunity to and did present evidence on pre-Act practices, including extensive evidence on the relationship between provisions of the collective bargaining agreements and General Order No. 27, promulgated by the Director General of Railroads in 1918, in an effort to show the provisions were not adopted with any intention to discriminate and have no racially discriminatory effects (*e.g.*, Pet. App. 59a–63a, 51a).

[9] The legislative history of Title VII offers no comfort to employers or unions who desire to continue unaltered seniority systems which perpetuate past discrimination, petitioners' arguments to the contrary notwithstanding (Terminal Pet. 18–19; BLE Pet. 12). *Quarles* v. *Philip Morris, Inc., supra,*

Similarly, the court of appeals was correct in holding that petitioners had failed to show that business necessity precludes changing the seniority systems sufficiently to alleviate their discriminatory features. To make this showing, it must be demonstrated not merely that the seniority systems contribute to such important goals as safety and efficiency, but that they are essential to achieving these goals. And there must be no acceptable alternative systems with less racial impact which will also achieve these goals. *United States* v. *Bethlehem Steel Corp., supra,* at 662; *Robinson* v. *Lorillard Corp., supra,* at 798; *Local 189, United Papermakers* v. *United States, supra,* at 989. As the court below properly ruled, there was no showing here that employees with seniority in the classes and crafts traditionally reserved for whites are the only employees of the terminal qualified to fill vacancies in these classes and crafts (Pet. App. 194a–199a).[10] The court of appeals gave due regard to considerations of safety and efficiency by providing in its guidelines for relief that the Terminal will have an absolute right to require every employee to "possess sufficient fitness and ability to adequately perform the job" (Pet. App. 211a).

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at 516–517; *Local 189, United Papermakers* v. *United States, supra,* at 987–988; *United States* v. *Bethlehem Steel Corp., supra,* at 661.

[10] The evidence shows that all but a very few of the Terminal's jobs are "entry level" jobs for which no prior experience is necessary (Pet. App. 179a, 195a). The evidence also shows that some incumbent blacks have successfully moved to jobs formerly filled entirely by whites even with the heavy handicap of not being able to exercise their accrued seniority in their new jobs (*e.g.*, Pet. App. 134a, 169a–170a).

The court of appeals also correctly ruled (Pet. App. 176a) that the government was not required to show discriminatory motivation in the adoption of the seniority systems. It is well established that an intentionally adopted employment practice which is in fact discriminatory is not saved from illegality by a mere neutral motive or purpose which does not qualify as a business necessity. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432. Accord, *Local 189, United Papermakers* v. *United States, supra,* at 996–997; *Robinson* v. *Lorillard Corp., supra,* at 796–797; *Jones* v. *Lee Way Motor Freight, Inc., supra,* at 250; *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194, 1201 (C.A. 7), certiorari denied, No. 71–468, December 14, 1971.

3. The relief prescribed by the court of appeals has been generally followed in such situations,[11] *i.e.,* the court defined the group of employees who had been affected by discriminatory assignment or promotion practices (the "affected group"—Pet. App. 210a) and directed that members of this group be allowed to compete on the basis of their Terminal seniority dates for vacancies in jobs formerly denied them in other crafts or classes.[12] Contrary to petitioners' conten-

[11] In a recent decision, by a divided vote, a panel of the Eighth Circuit recently refused, apparently on procedural grounds (see slip op. p. 4, n. 3), to afford similar relief. *United States* v. *St. Louis-San Francisco Railway Co.*, C.A. 8, No. 71–1247, decided February 22, 1972. On March 14, 1972, the Eighth Circuit granted the government's petition for rehearing *en banc* in that case and set the case for oral argument before the full court on May 8, 1972.

[12] Petitioners object to the court of appeals' issuance of guidelines for relief (Terminal Pet. 23–24; BRT Pet. 18; BRT Pet. 22). Courts of appeals have often issued guidelines in cases involving racial discrimination in order to give concrete direc-

tions, the relief does not give "superseniority" to members of the affected group, nor, since it applies only to future vacancies, does it require incumbents to be discharged. Rather, when a member of the affected group, after having been found to have the ability to do the job (Pet. App. 211a), has transferred into a craft or class formerly reserved for whites, total time worked for the employer (Terminal seniority) will be used by all employees, black and white, whenever resort is customarily had to seniority (Pet. App. 200a, 210a–211a). An earlier hired white employee will thus have greater seniority than a later hired black. See *United States* v. *Bethlehem Steel Corp., supra,* at 661.[13]

Further, the relief directed by the court of appeals fully protects the legitimate business interests of the Terminal by making clear that: (1) no member of the affected group may obtain a job for which the Ter-

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tions to the district court and the parties on how to cure the discrimination, *E.g., United States* v. *Bethlehem Steel Corp., supra,* at 666 (C.A. 2) (employment); *United States* v. *Sheet Metal Workers, Local 36, supra,* at 132–133, 137, 140 (C.A. 8) (employment); *Singleton* v. *Jackson Municipal Separate School Dist.*, 426 F. 2d 1364, 1369–1371 (C.A. 5) mandate modified, 430 F. 2d 368 (schools); *United States* v. *West Peachtree Tenth Corp.*, 437 F. 2d 221, 229–231 (C.A. 5) (housing). Such a procedure is particularly appropriate in suits brought under Section 707 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6, (App., *infra*), which requires the courts to cause the case to be in every way expedited.

[13] And, contrary to the bidding picture drawn by petitioner BLE (BLE Pet. 21), if an employee in an engine service craft has relinquished an earlier seniority date with the Terminal to move to his present job, he will nevertheless use that earlier date when bidding on a vacancy in his new craft against a member of the affected group.

minal determines he is not qualified; (2) members of the affected group will normally use their Terminal seniority date only once to gain a job in another craft or class; (3) no person presently holding a job will lose it, as the relief applies only to vacancies (Pet. App. 209a–211a). Similar relief has been required in every other industry in which the issue has been raised and finally adjudicated in order to afford minorities who have been the victims of past discrimination an opportunity to take their rightful place in the job complex of their employers.[14] As an "employer" within the meaning of Title VII, 42 U.S.C. 2000e(b), (*Norman* v. *Missouri Pacific Railroad*, 414 F. 2d 73, 79 (C.A. 8)), the Terminal, along with the unions, is subject to the Act's prohibitions of racial discrimination and there is no legally valid reason to except it from the Act's remedial requirements.[15]

Petitioners assert that since the court of appeals ruled that the Terminal had not discriminated in initial job assignments after the effective date of Title

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[14] *E.g.*, *United States* v. *Bethlehem Steel Corp.*, *supra* (steel-making plant); *Griggs* v. *Duke Power Co.*, *supra* (electric power plant); *United States* v. *Virginia Electric and Power Co.*, 327 F. Supp. 1034 (E.D. Va.) (electric power company); *United States* v. *Central Motor Lines, Inc.*, 4 [CCH] EPD ¶ 7624 (W.D. N.C., Civ. No. 2521, Dec. 23, 1971) (interstate motor carrier); *Local 189, United Papermakers* v. *United States*, *supra* (paper mill); *Robinson* v. *Lorillard Corp.*, *supra* (tobacco plant); *Clark* v. *American Marine Corp.*, 304 F. Supp. 603 (E.D. La.) (marine company); *Irvin* v. *Mohawk Rubber Co.*, 308 F. Supp. 152 (E.D. Ark.) (rubber plant).

[15] The language of the Act makes clear Congress' intent to cover the railroad industry. Section 701(e), 42 U.S.C. 2000e (e), in defining covered labor organizations, specifically refers to those certified under the Railway Labor Act.

VII, the court incorrectly included blacks hired after that date within the affected group. However, the court of appeals made clear that its ruling of no discrimination in post-Act initial job assignments did "not encompass the Baggage and Mail Department's personnel test or job criteria in that department" (Pet. App. 186a, n. 26).[16] Since all blacks hired by the Terminal in the post-Act period were employed as Porters in the Baggage and Mail Department and all were hired after the discriminatory test was initiated in 1967 (Pet. App. 178a), they were subjected to an employment practice made unlawful by the Act. For that reason, the court of appeals did not abuse its discretion by including them in the affected group for purposes of relief. *Griggs* v. *Duke Power* Co., *supra*, 401 U.S. 424. Cf. *United States* v. *Local 189, United Papermakers*, 301 F. Supp. 906, 912 (E.D. La).[17]

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[16] The Terminal began using the test as a factor in determining initial job assignments and transfers to better paying jobs in the Baggage and Mail Department in April 1967; the court of appeals held the test's use violated Title VII because the test had not been properly validated, and also because white incumbents in the jobs for which it was given did not have to take it (Pet. App. 204a–206a). See *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424; *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314, 321 (E.D. La.).

[17] We interpret the court of appeals' opinion as including in the affected group all those blacks hired post-Act who were subjected to the test, which included all blacks hired post-Act until the time of trial (Pet. App. 178a). The Terminal states that it has now stopped using the test (Terminal Pet 7–8, n. 4), but this information was not available to the court of appeals. Newly hired blacks who are no longer subjected to the test would not, in our view, be included in the affected group.

4. The Terminal and the Seaboard Coast Line as *amicus curiae* also ask this Court to review the issue—not argued before the court of appeals—whether in addition to the unions all workers who may henceforth be required to compete for vacancies in a larger class as a result of the corrective order are indispensable parties to this action (Terminal Pet. 24–25; Amicus Br. 2–5). Representation of employees concerning seniority rights has traditionally been entrusted to the employees' union. A labor organization has the authority to make binding changes in the seniority expectations of the employees it represents in the context of collective bargaining, changes of operations, and grievances. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Humphrey* v. *Moore*, 375 U.S. 335; *Vaca* v. *Sipes*, 386 U.S. 171. The courts have regularly ordered seniority changes under Title VII where labor organizations were the only parties to the litigation representing the interests of the affected employees, *e.g.*, *Local 189, United Papermakers* v. *United States, supra; United States* v. *Bethlehem Steel Corp., supra; Robinson* v. *Lorillard Corp., supra.* The only express appellate ruling on joinder of employees required to compete in a larger class as a result of a court order under Title VII is in accord with the holdings in the above cited cases, and in the case at bar. *Bowe* v. *Colgate-Palmolive Co., supra.* In that case the Seventh Circuit held unlawful under Title VII a job classification system which discriminated against female employees by

restricting their seniority rights to certain jobs; and in doing so rejected the company's contention that there was a failure of necessary joinder of its male employees, pointing out that the union, which was a party, had negotiated the agreement and was adequate to represent in court the interests of male employees in that agreement. 416 F.2d at 719.

In the present case as in *Bowe* the unions vigorously defended the contract they had negotiated and fully represented the interests of the employees who under the court of appeals' ruling will be required to compete for job vacancies on an equal footing with other employees.

Nor is there any issue here as to the right of employees who may feel their interests are not adequately represented by their union to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. See *Trbovich* v. *United Mine Workers of America*, No. 71-119, decided January 17, 1972. No application for intervention has been made. Where timely applications have been made in other Title VII cases, the United States has acquiesced in such intervention. See *United States* v. *Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La.) affirmed, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919.

The Terminal, and Seaboard Coast Line Railroad as *amicus curiae*, cite several cases in support of their contention that employees whose seniority may be adversely affected are indispensable parties (Terminal Pet. 24-25; Amicus Br. 2-5). Of the four

cases cited, three[18] are Title VII cases in which two district courts in Georgia ruled that employees whose seniority rights would be affected by an order eliminating discrimination are indispensable parties. The most recent of these decisions (*English*) has been appealed to the Fifth Circuit. To the extent these decisions disagree with the holding in the present case and in *Bowe, supra,* we submit they are incorrect. Their authority is at best questionable in light of the Fifth Circuit's holding in the present case and pending its consideration of *English*. The fourth case cited is *Neal* v. *System Board of Adjustment,* 348 F. 2d 722 (C.A. 8). That was not a Title VII case[19]; and the decision to dismiss was based on failure to exhaust internal union remedies, not on failure to join an indispensable party (348 F. 2d at 727).[20] Moreover,

[18] *Banks* v. *Seaboard Coast Line Railroad Co.*; 51 F.R.D. 304 (N.D. Ga.); *Hayes* v. *Seaboard Coast Line Railroad Co.*, 3 [CCH] E.P.D. ¶ 8169 (S.D. Ga., Civ. No. 2371 Apr. 19, 1971); *English* v. *Seaboard Coast Line Railroad Co.*, 4 [CCH] E.P.D. ¶ 7505 (S.D. Ga., Civ. No. 691, September 7, 1971), eappeal pending, No. 71-3362, C.A. 5.

[19] It is established that judicial decisions under the doctrine of fair representation are not binding with respect to Title VII. Compare *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498 (C.A. 5), with *Whitfield* v. *Steelworkers Local 2708*, 263 F.2d 546 (C.A. 5), certiorari denied, 360 U.S. 902; and *Norman* v. *Missouri Pacific Railroad, supra*, with *Howard* v. *St. Louis-San Francisco Railway Co.*, 361 F.2d 905 (C.A. 8), certiorari denied, 385 U.S. 986.

[20] Compare *Conley* v. *Gibson*, 355 U.S. 41. While recognizing that further discussion was not necessary to its decision, the court in *Neal* stated that the Brotherhood of Clerks and representatives of the classes of employees were indispensable parties under the fair representation doctrine of *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192.

we submit that in cases concerning discrimination prohibited by Title VII, there is no more reason to assume that the unions will not adequately represent the interests of employees whose seniority may be adversely affected than there is in collective bargaining, grievances, and changes in operations. See p. 17, *supra*. It should not be assumed that such employees are necessarily opposed to the objectives of Title VII suits and, if they do in fact oppose the actions brought and do not believe they are adequately represented by their union, intervention is an adequate remedy.

5. The court of appeals properly held that the maintenance of segregated locals by BRAC and BMWE violates Section 703(c) of the Act, 42 U.S.C. 2000e-2(c). As the court of appeals observed, black employees of the Terminal belonging to the segregated BMWE local have had no vote in selecting the delegate who represents them for collective bargaining, and black employees in the segregated BRAC local have not been provided notices of openings in better paying jobs as have members of the white local. Both practices adversely affect blacks' employment opportunities (Pet. App. 207a–208a). Moreover, as the court held, UTU Local 624–T's refusal to recruit for membership blacks it represents, but whom its constitution formerly barred from membership because of their race, does not fulfill its obligation under Title VII to eradicate the effects of past discrimination (Pet. App. 208a, 159–160a). Courts have consistently held such continuing vestiges of racial discrimination to be unlawful. *Local 53, Asbestos Workers* v. *Vogler, supra; United States* v. *Sheet*

Metal Workers, Local 36, supra; United States v. *International Longshoremen's Ass'n*, 319 F. Supp. 737, 741–742 (D. Md.), appeal pending, No. 71–1367 (C.A. 4); *Hicks* v. *Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La); *United States* v. *Local 189, United Papermakers, supra*, 301 F. Supp. at 919.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C.S. 2000e–2(a), provides:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 703(c) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2(c), provides:

It shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or

otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2(h), provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin * * *.

Section 706(g) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–5(g), provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate * * *.

Section 707(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–6(a), provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice

> of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil suit in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Section 707(b), of the 1964 Civil Rights Act, 42 U.S.C. 2000e–6(b) provides in relevant part:

> The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. * * *
>
> In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case

may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

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IN THE

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OCTOBER TERM, 1971

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THE BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Regrettably, petitioners find it necessary to respond to the contentions advanced by the Government in opposition to review by this Court of the decision of the court below. The views expressed by the Government are shown either to be not responsive to the reasons urged for granting the writ, or are erroneous characterizations of the evidence of record, the findings and conclusions of the lower court thereon and, indeed, the action required by the Court of Appeals to eliminate perpetuation of the effects of Terminal's alleged pre-Act discriminatory employment practices.

To the extent that the Government has erroneously characterized remedial action required of petitioners in an attempt to persuade the Court that review is

unnecessary, petitioners believe that such errors should be disclosed in order that the petitions receive proper consideration by the Court.

Considered as a whole, the Government's representations mainly express concurrence with the decision reached by the court below, and as such do not relate to the reasons submitted in support of the request for grant of the writ. Reference by the Government to various portions of the opinion below to support its contention that the opinion of the majority of the court below in its entirety is correct, serves no useful purpose for the Court. The challenge made by petitioners is that the findings made and relied upon by the majority below are not supported by the record, are not proper interpretations and applications of the statute involved, and the conclusions based upon such erroneous findings present substantial questions relating to a recently enacted statute such as to require review and corrective action by this Court.

In illustration, we can agree with the Government that the Court below held that the District Court committed three principal errors in (1) restricting its view of what constituted racially discriminatory conduct to specific acts occurring after the effective date of Title VII (July 2, 1965); (2) limiting evidence of discrimination to a period beginning only a few years before Title VII's effective date; and (3) in not giving proper weight to the uncontroverted statistical evidence offered by the Government (Govt. Br., p. 6).

The Government correctly states that the union petitioners challenge the holding of the Court of Appeals that the Terminal had engaged in discriminatory pre-Act assignment practices. The Government correctly asserts (Govt. Br., p. 9) that it con-

tended that the statistics in the case show that all black employees of the Terminal hired before the Act were initially assigned to lower paying jobs, whereas white employees were either initially assigned to higher paying jobs or promoted to these jobs after hiring. Its further contention, (Govt. Br., p. 10) however, that the Court of Appeals did not base its holding on the statistical evidence alone, and that the court below examined "the total employment picture" at the Terminal, is not, and cannot be, supported by the portions of the opinion to which the Government directs the attention of the Court, or by any evidence of record.

A casual reading of those portions of the opinion below referred to and relied upon here by the Government (Pet. App. 174a, 176a) alone, or in the light of the sections of the opinion immediately preceding and following the cited portions, discloses that the court below was there discussing *post-Act* Terminal employment decisions, which as shown (Pet. App. 181a-186a) it held ultimately were not racially discriminatory because the Government "only feebly attempted to refute" the evidence of non-discriminatory practices by the Terminal, and, accordingly, having "shunned the burden of augmenting its statistics, the Government's challenge in this regard must fail" (Pet. App., p. 186a).

Accordingly, as initially and now contended by petitioners, the Government is shown to rely only on a "head count" to refute petitioners' "challenge" that the holding of the court below did not, and could not, find evidentiary support in the record showing that any black employee of Terminal has been the victim of *pre*-Act discriminatory employment practices.

As to the alleged "use" by the Terminal (Govt. Br., p. 10) of provisions of collective bargaining agree-

ments claimed to have been designed to discriminate against blacks (Govt. Br., p. 7, note 6), it is submitted that the Government is relying upon the speculative and conjectural views of the majority below set forth in certain sections of their opinion (Pet. App. 168a-171a, 189a-190a), which in the light of the findings set forth in other sections of the opinion below (e.g. Pet. App. 142a-147a, 151a-152a), and evidence otherwise in the record before the court below (e.g. Pet. App. 76a-90a), cannot, as contended by petitioners, support a finding of discrimination in Terminal pre-Act hiring and assignment practices.[1]

Petitioners urge that the remaining contentions advanced by the Government as set forth on pages 10-13 of its brief are equally irrelevant because of reliance by the Government on "findings" of the court below which are shown, as contended by petitioners, to be contradicted by the relevant and probative evidence of record relied on by the District Court but ignored by the court below.

In its effort to minimize the drastic impact of the decision below, the Government has urged on this Court a plainly erroneous interpretation of the requirements imposed by the "guidelines" for changes in the

[1] Compounding of the erroneous conclusions of the court below results from the Government's endorsement of unwarranted application of the provisions of the described contracts to *all* present (and some future), black employees of Terminal whose job opportunities are not and could never have been affected by such contracts, and without consideration of the number of job opportunities available, even if it be conceded that the Firemen's contract and the Clerks' contract in some undisclosed pre-Act period caused the Terminal to discriminatorily assign blacks to certain jobs. Obviously there is no evidence to show that any present employee of Terminal was affected by the contracts at any time prior to or subsequent to 1949.

seniority provisions of the collective bargaining agreements. The Government challenges (Govt. Br., p. 14) the assertion by petitioners that the remedies ordered by the court below give "superseniority" only to members of the affected group (constituting all black employees now employed and to be employed until issuance of the final judgment of the District Court). The Government asserts that the relief applies only to future vacancies and does not require job incumbents to be "discharged" (Govt. Br. pp. 14-15). Clearly the requirement in Guideline D (Pet. App. 212a) specifically guarantees a black employee the use of a so-called Terminal seniority (initial hire) date in determining his right to demotion, layoff, furlough, or any other right affected by seniority, including promotion, in his new craft or class, while not granting such a right to any non-member (white employee) of the affected group.

The Government's further characterization at page 14 of its brief (and in note 13 thereon), that after a member of the affected group (black employee) has obtained a position in a new craft or class, total time worked for the employer (Terminal seniority) will be used by all employees, black and white, whenever resort is customarily had to seniority, is shown to be clearly erroneous by even a casual reading of the "guidelines" ordered by the court below.[2]

[2] The Government's seeming willingness to now back away from endorsement of the requirements of the "guidelines" and to urge that a number of white employees will obtain revised seniority rights, suggests either that it has lately become aware of the drastic impact the "guidelines" would have upon railroad workers and the industry or, that it is not as much concerned with mitigating the effects of alleged pre-Act discrimination against Terminal's black employees as it is in simply emasculating the railroad craft and seniority system.

The insensitivity of the Government's position becomes clearly evident by its reliance (Govt. Br., p. 18) on *Bowe* v. *Colgate-Palmalive Co.*, 416 F.2d 711, 719, as support for its argument that the several unions (petitioning unions) are parties adequate to protect the interests of the white employees whose livelihoods will be so drastically adversely affected by the grant of preferential superseniority only to black employees of Terminal. *Bowe* adds nothing startlingly different to the law than that set forth in *Steele*, *Tunstall*, and *Graham* (Pet. App. p. 151a) as concerns the duty and authority of a union to fairly represent all employees in the craft or class for which it is the collective bargaining representative. However, *Bowe* and such cases cannot be understood to have application *inter-craft*-wise, and no union subject to the Railway Labor Act can lawfully undertake to contract to provide for, or modify, seniority rights for the employees it represents as concerns jobs in crafts and classes of railway employees for which it is not the collective bargaining representative.[3] Only the court below will be found to possess such sweeping power over the jobs of railway employees throughout this nation, unless review is granted, and the ruling below required to be conformed to law.

The Government agrees (Govt. Br., p. 9) with petitioners that the decision below constitutes a precedent for the railroad industry, which can be expected to irreparably damage the livelihood of thousands of railway employees, but the Government does not believe the likelihood of that prophecy justifies review of the

[3] The finding in *Bowe* (p. 719, note 9), of the non-applicability of its ruling to employees covered by the Railway Labor Act, is not mentioned by the Government.

decision by this Court. Petitioners suggest that the philosophy and legal position of the Government disclosed by its brief in opposition warrant, if not require, a conclusion that if the decision of the majority below is allowed to stand, whenever a company is found to have had as of the effective date of the Act a racial imbalance among its employees in jobs requiring prior education, training, and experience, and there exists a collective bargaining agreement or another arrangement whereby incumbents of such jobs are given some degree of security therein, the employer and the collective bargaining representatives of such employees will be found to be in violation of the Act.

Respectfully submitted,

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